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# **A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private Contractors, Rights-Stripping and ‘Chameleonic’ Horizontal Effect**

**Alexander Williams\***

The question whether hybrid public authorities can rely on their own Convention rights during the performance of “functions of a public nature” is a key issue, not just in itself but also as an important factor to consider in determining the proper scope of that term.<sup>1</sup> Under s.6(3)(b) of the Human Rights Act 1998, a private person “certain of whose functions are functions of a public nature” becomes a hybrid public authority and is therefore required to comply with the European Convention on Human Rights (ECHR) when it undertakes a public act.<sup>2</sup> This article advances two main arguments. First, during the performance of their public functions, hybrid public authorities should be regarded by domestic courts as capable of relying on their own Convention rights to the same extent as could ‘ordinary’ private persons who are not regarded as hybrid public authorities.<sup>3</sup> Secondly, the most effective way of ensuring adequate protection of hybrid public authorities’ Convention rights is to interpret the hybrid public authority concept as generating what this article refers to as ‘chameleonic’ horizontal effect. Under the chameleonic model, the hybrid public authority scheme is seen as creating neither a purely ‘vertical’ nor ‘horizontal’ framework of rights protection against hybrid public authorities. Instead, as the term ‘chameleonic’ suggests, the framework switches, from ostensibly vertical to a position roughly describable as indirectly horizontal in substance, at the point where the dispute between private claimant and hybrid public authority defendant reaches court. The purpose of the chameleonic model is to guarantee that hybrid public authorities, when in court and faced with an attempt by a private claimant to use the Convention against them, are able to deploy their own Convention rights defensively against that claimant to the same extent as ordinary private persons could.

The following analysis divides into three parts. In view of the intricacies of the hybrid public authority concept and the need to justify adding to the already voluminous literature concerning the interpretation of s.6(3)(b), the first part makes the research case, explaining how this article’s analysis and conclusions inform the understanding of the concept. In particular, it explores the potential impact of this article on the ongoing debate as to the proper scope of s.6(3)(b) and, in the process, briefly introduces and defends against recent judicial attack the basic doctrinal argument in favour of reading s.6(3)(b) to include the provision of contracted out public services

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**\* Lecturer in Law, University of Durham.** This article derives from a paper given by the author in the Civil Liberties section of the Society of Legal Scholars Annual Conference on September 7, 2009 at the University of Keele. The author is indebted to Stephen Bailey, Fiona de Londras, Helen Fenwick, Gavin Phillipson and Adam Tomkins for comments on the paper, on an earlier draft of this article, or both. The author would also like to thank the anonymous reviewer for comments on an earlier draft. The usual disclaimer applies.

<sup>1</sup> On the link between a public authority’s ability to rely on the Convention and the width of the term ‘public authority’ under s.6, see D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476, pp.490-492.

<sup>2</sup> HRA, ss 6(1), 6(3)(b) and 6(5).

<sup>3</sup> For brief and tentative support for this idea, see H. Davis, “Public Authorities as ‘Victims’ under the Human Rights Act” [2005] C.L.J. 315, p.321.

by private contractors operating on behalf of central and local government organisations.<sup>4</sup> The second part begins the core analysis by examining and attempting to clarify the growing corpus of Strasbourg jurisprudence concerning the concept of the ‘governmental organisation’, arguing, contrary to recent judicial and academic assumption,<sup>5</sup> that the concept does not extend to private persons performing ‘public’ or ‘governmental’ functions. The result, as the third part explores, is that the bodies designated as hybrid public authorities under s.6(3)(b) remain capable of asserting their own Convention rights in Strasbourg and under the HRA, even during the performance of their public functions. The third part then assesses the implications of this finding for the hybrid public authority concept under the HRA, arguing that the most appropriate way of ensuring adequate Convention protection for hybrid public authorities is to read the hybrid public authority concept in accordance with the chameleonic model.

### The ‘rights-stripping’ idea and the research case

The hybrid public authority concept has spawned a considerable amount of literature since the HRA’s entry into force,<sup>6</sup> the vast majority of which criticises the courts’ apparent refusal to interpret s.6(3)(b) to include the provision of contracted out public services by private operators acting on behalf of central and local government organisations.<sup>7</sup> The extent to which hybrid public authorities can rely on their own Convention rights, however, has never been comprehensively academically or judicially addressed.<sup>8</sup> Hybrid public authorities, as their name implies, are not ‘purely’

<sup>4</sup> This article does not address the distinct (and less topical) issue of privatisation, where public enterprises are divested to private companies. The courts have previously held that the delivery of privatised services does not necessarily entail the performance of public functions under s.6(3)(b): *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (Q.B.), [2007] 1 W.L.R. 163; *James v London Electricity Plc* [2004] EWHC 3226 (Q.B.).

<sup>5</sup> Making this assumption, see H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106; *R. (West) v Lloyd’s of London* [2004] EWCA Civ 506, [2004] H.R.L.R. 27 at [36]-[39] (Brooke L.J.); *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [161] (Lord Neuberger); *R. (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] H.R.L.R. 29 at [35] (Elias L.J.) and [117]-[118] (Rix L.J.) (dissenting).

<sup>6</sup> For an overview, see D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476; P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551; D. Oliver, “Functions of a public nature under the Human Rights Act” [2004] P.L. 329; C. Donnelly, “*Leonard Cheshire* again and beyond: private contractors, contract and s.6(3)(b) of the Human Rights Act” [2005] P.L. 785. More recently, see J. Landau, “Functional public authorities after *YL*” [2007] P.L. 630; M. Elliott, “‘Public’ and ‘private’: defining the scope of the Human Rights Act” [2007] C.L.J. 485; S. Palmer, “Public, private and the Human Rights Act 1998: an ideological divide” [2007] C.L.J. 559; A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524.

<sup>7</sup> See, in particular, P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551; C. Donnelly, “*Leonard Cheshire* again and beyond: private contractors, contract and s.6(3)(b) of the Human Rights Act” [2005] P.L. 785; A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524; Joint Committee on Human Rights, Seventh Report, *The Meaning of Public Authority under the Human Rights Act* (2003-04 HL 39), (2003-04 HC 382); Joint Committee on Human Rights, Ninth Report, *The Meaning of Public Authority under the Human Rights Act* (2006-07 HL 77), (2006-07 HC 410); S. Palmer, “Public functions and private services: a gap in human rights protection” (2008) 6 I.J.C.L. 585. Cf D. Oliver, “Functions of a public nature under the Human Rights Act” [2004] P.L. 329.

<sup>8</sup> Baroness Hale left the issue “for another day” in her dissent in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [74]. Lord Nicholls stated simply that hybrid public authorities should be able to rely on their own Convention rights “when necessary” in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37,

public bodies. They are only regarded as public authorities to the extent that they are engaged in public as opposed to private activity.<sup>9</sup> Whilst it is therefore clear that these bodies should be able to rely on the Convention in their private capacities, their position during the performance of public functions under s.6(3)(b) is less obvious. Howard Davis has tentatively noted the possibility that hybrid public authorities might be capable of relying on the Convention in their public capacities,<sup>10</sup> but his remarks appear to have been overshadowed by a common and untested assumption amongst other academics and judges that hybrid public authorities, when performing public functions, are somehow disabled from relying on the Convention.<sup>11</sup> In the Court of Appeal in *YL v Birmingham City Council*, for example, Buxton L.J. bluntly asserted that “when discharging its public functions... [a hybrid public authority] has no such rights.”<sup>12</sup> The idea that hybrid public authorities lose Convention protection when performing public functions will be referred to as the ‘rights-stripping’ idea.

There is no explicit foundation for the rights-stripping idea in the HRA. Neither, it would seem, is there an implicit one. Under art.34 ECHR, the European Court of Human Rights in Strasbourg can only hear Convention complaints from individuals or non-governmental organisations.<sup>13</sup> Governmental organisations, by contrast, are therefore incapable of asserting Convention rights. This position is reproduced domestically by s.7 HRA, which provides that individuals can only assert Convention rights against public authorities in domestic courts if those individuals would satisfy art.34 in respect of the same claim brought against the UK in Strasbourg.<sup>14</sup> Hence, in the absence of a sufficiently clear statement by the HRA to give effect to the rights-stripping idea, s.7 implies that hybrid public authorities can rely on their own Convention rights in domestic law, even during the performance of their public functions under s.6(3)(b), unless they would be considered by Strasbourg as governmental organisations under art.34 ECHR.

The relevant question to ask for present purposes, therefore, is whether or not Strasbourg recognises what will be referred to as a ‘hybridity’ doctrine, i.e. a doctrine recognising that a private person is legally treated as a governmental organisation when performing certain ‘public’ or ‘governmental’ functions. Although no court or academic writer has rigorously analysed the relevant Strasbourg jurisprudence with this specific question in mind,<sup>15</sup> it is evident from the emerging judicial and academic tendency to view the governmental organisation jurisprudence as potentially indicative of the meaning of the term “functions of a public nature” under s.6(3)(b) that there exists a widespread assumption, at least, that the jurisprudence does

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[2004] 1 A.C. 546 at [11]. Cf H. Davis, “Public Authorities as ‘Victims’ under the Human Rights Act” [2005] C.L.J. 315, p.321.

<sup>9</sup> HRA, ss 6(1), 6(3)(b) and 6(5).

<sup>10</sup> H. Davis, “Public Authorities as ‘Victims’ under the Human Rights Act” [2005] C.L.J. 315, p.321.

<sup>11</sup> See e.g. D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476, p.492; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford, 2006), p.122; H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.109.

<sup>12</sup> [2007] EWCA Civ 26, [2008] Q.B. 1 at [75].

<sup>13</sup> Article 34: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”

<sup>14</sup> HRA, ss 7(1) and 7(7).

<sup>15</sup> See H. Davis, “Public Authorities as ‘Victims’ under the Human Rights Act” [2005] C.L.J. 315, p.321 for brief analysis, however.

recognise private persons as governmental organisations when performing public functions.<sup>16</sup> The second part of this article questions this assumption. The only relevance of the governmental organisation jurisprudence to the meaning of “public authority” under the HRA, it would seem, is to the identification of *core* public authorities. Section 6 reads as follows:

- “(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right...
- (3) In this section ‘public authority’ includes—
- (a) a court or tribunal, and
  - (b) any person certain of whose functions are functions of a public nature...
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private...”

Section 6(3), by stating merely that the term “public authority” *includes* courts and tribunals and hybrid public authorities, is typically thought to envisage a residual category of ‘obvious’ or ‘core’ public authorities such as central and local government organisations.<sup>17</sup> Whereas hybrid public authorities as private persons performing public functions are relieved by s.6(5) from the obligation to comply with the Convention in their private capacities, core public authorities, unmentioned explicitly by the HRA and thus by s.6(5), are not. Like governmental organisations in Strasbourg, all of their acts, whether public or private, must therefore comply with the Convention.<sup>18</sup>

#### *Research case and implications*

With the foregoing in mind, this article’s analysis and conclusions impact upon the hybrid public authority concept in three main ways.

First, by clarifying the scope of the governmental organisation jurisprudence, they state a clear case against the recent judicial inclination to view that jurisprudence as a useful interpretative aid to the meaning of the term “functions of a public nature” under s.6(3)(b). This finding may affect the scope of that provision because some judges have previously refused to interpret s.6(3)(b) as being any broader than the scope of the governmental organisation category in Strasbourg.<sup>19</sup> This represents an unjustified restriction on the scope of s.6(3)(b) if, as this article argues, the governmental organisation jurisprudence bears no relation to the meaning of the term “functions of a public nature” in the first place.

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<sup>16</sup> On this assumption, see H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106; *R. (West) v Lloyd’s of London* [2004] EWCA Civ 506, [2004] H.R.L.R. 27 at [36]-[39] (Brooke L.J.); *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [161] (Lord Neuberger); *R. (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] H.R.L.R. 29 at [35] (Elias L.J.) and [117]-[118] (Rix L.J.) (dissenting).

<sup>17</sup> See e.g. D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476, p.478; *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [7]-[8] (Lord Nicholls).

<sup>18</sup> See e.g. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [7] (Lord Nicholls). On the position of governmental organisations in Strasbourg, see *Danderyds Kommun v Sweden* (Application No. 52559/99) (unreported); *Ayuntamiento de Mula v Spain* (Application No. 55346/00) (unreported).

<sup>19</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [159] and [161] (Lord Neuberger); *R. (West) v Lloyd’s of London* [2004] EWCA Civ 506, [2004] H.R.L.R. 27 at [36]-[38] (Brooke L.J.).

Secondly, comprehensively assessing the extent to which hybrid public authorities can rely on their own Convention rights is a useful exercise in itself because the issue is likely to require firm resolution by the courts before too long. Parliament has recently overruled the conclusion in *YL v Birmingham City Council*<sup>20</sup> and the earlier case of *R. (Heather) v Leonard Cheshire Foundation*<sup>21</sup> by enacting the Health and Social Care Act 2008 (HSCA), s.145 of which provides for the application of s.6(3)(b) HRA to the provision of residential care services by private providers acting on behalf of local authorities required by the National Assistance Act 1948 to arrange that care. Since private care home operators providing these services can no longer deny their status as hybrid public authorities under s.6(3)(b), they will no doubt attempt to respond in other ways to Convention-based claims by care home residents in court. Taking the classic *Leonard Cheshire* and *YL* example of a contracted-out care home operator accused in court of violating the right to respect for home life under art.8 ECHR by seeking to evict a resident, one such defence might be for the provider, now a hybrid public authority, to advance its own Convention right to respect for property under art.1 of the First Protocol of the ECHR in order to justify its behaviour.<sup>22</sup>

Thirdly, debunking the rights-stripping idea may usefully inform the overarching debate as to the general position under s.6(3)(b) HRA of private organisations delivering contracted out public services. The extent to which hybrid public authorities can rely on their own Convention rights is bound to impact upon the scope of s.6(3)(b). The more draconian the effect on a private individual of being brought within s.6(3)(b) as a hybrid public authority, the narrower one would expect Parliament to have intended that provision to apply.<sup>23</sup> This is particularly relevant to the position of contracted out public service providers because the attempts by the majority of the House of Lords in *YL* to counter the basic argument in favour of reading s.6(3)(b) to apply to contracted out public services were largely unconvincing, indicating in turn that the issue is still live and that a *prima facie* case in favour of interpreting s.6(3)(b) to apply to private contractors still exists.

A detailed reappraisal of the relative strengths and weaknesses of reading s.6(3)(b) to include the provision of contracted out public services is not the aim here,<sup>24</sup> but it nevertheless helps to introduce and briefly defend the basic argument in favour of doing so in order to illustrate this article's potential contribution to it. Although their Lordships' remarks on the status under s.6(3)(b) of contracted out services in *YL* were

<sup>20</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95.

<sup>21</sup> [2002] EWCA Civ 366, [2002] H.R.L.R. 30.

<sup>22</sup> It is clear that hybrid public authorities, most of whom will be legal persons, will be unable to rely on Convention rights exercisable only by natural persons, such as the right to freedom from torture (art.3) and to freedom of conscience (art.9): see *Verein "Kontakt-Information-Therapie" v Austria* (1988) 57 D.R. 81.

<sup>23</sup> D. Oliver, "The frontiers of the State: public authorities and public functions under the Human Rights Act" [2000] P.L. 476, pp.490-492; *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [11] (Lord Nicholls); A. Williams, "*YL v Birmingham City Council*: Contracting out and 'functions of a public nature'" [2008] E.H.R.L.R. 524, p.530.

<sup>24</sup> On this issue, see especially P. Craig, "Contracting out, the Human Rights Act and the scope of judicial review" (2002) 118 L.Q.R. 551 and C. Donnelly, "*Leonard Cheshire* again and beyond: private contractors, contract and s.6(3)(b) of the Human Rights Act" [2005] P.L. 785.

made in relation to the provision of residential care services, where Parliament has since intervened to make its position on the delivery of such services by private contractors clear,<sup>25</sup> they are still relevant to the remaining contexts where contracting out may occur. In *Leonard Cheshire*, affirmed by the House of Lords in *YL*, the Court of Appeal ruled that a private charity was not performing a public function under s.6(3)(b) when delivering residential care services on behalf of a local authority. Leading the court in *Leonard Cheshire*, Lord Woolf C.J. stated that “it does not follow that the charity is performing a public function” under s.6(3)(b) when providing residential care, *even though the local authority would have been regarded as performing a public function when doing so itself*.<sup>26</sup> Paul Craig’s response, which will be referred to as the ‘contracting out’ argument, is that a function, if public in nature when performed by a local authority or any other core public authority, “should equally be so [under s.6(3)(b)] when contracted out” and performed by a private provider on the local authority’s behalf.<sup>27</sup>

The majority’s responses to this argument in *YL*, with respect, left much to be desired. Lords Mance and Neuberger denied that the care home context involved contracting out altogether, because the only duty imposed upon local authorities by the National Assistance Act was to *arrange* accommodation rather than undertake the different function of *providing* it as the private operator did.<sup>28</sup> That the local authority enjoyed a statutory power to provide the accommodation itself, and that the provider was doing so on the local authority’s behalf, had no bearing on the nature of the function performed by the private provider in their Lordships’ eyes. Rightly described by Baroness Hale as “artificial and legalistic” in her dissent,<sup>29</sup> this view simply ignores without more, rather than addresses, the logical force of the contracting out argument in relation to functions which core public authorities have *powers* rather than *duties* to perform in-house.<sup>30</sup> In a second attempt to address the contracting out argument, Lord Scott rhetorically asked:

“If every contracting out by a local authority of a function that the local authority could, in exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority... for section 6(3)(b) purposes, where does this end?”<sup>31</sup>

The apocalyptic prediction that “every” instance of contracting out would render the contractor a hybrid public authority is unfounded. The contracting out argument would only apply to functions regarded as *public* in nature when performed by the core public authorities who contract them out to private providers.<sup>32</sup> Although the

<sup>25</sup> HSCA, s.145.

<sup>26</sup> *R. (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] H.R.L.R. 30. at [15].

<sup>27</sup> P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551, p.556.

<sup>28</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [114] (Lord Mance) and [147] (Lord Neuberger).

<sup>29</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [66]. See also [16] (Lord Bingham).

<sup>30</sup> See further A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524, p.529.

<sup>31</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [30]. See also [153] (Lord Neuberger).

<sup>32</sup> P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551, p.556.

argument does presuppose a reasonably clear distinction between the ‘public’ and ‘private’ functions of core public authorities, a basic distinction can at least be drawn between clearly public functions “in the classic, social welfare sense”<sup>33</sup> such as providing residential care services, on the one hand, and clearly private ones such as employing cleaning staff for local authority offices, on the other. Whilst separating the public from private functions of core public authorities may seem an unnatural exercise as it has no bearing on *their* HRA liability as bodies required to comply with the Convention in respect of all their acts,<sup>34</sup> the contracting out argument demonstrates that it may nevertheless assist the interpretation of the term “functions of a public nature” under s.6(3)(b).<sup>35</sup> Thus, Lord Neuberger’s assertion in *YL* that the concept of public functions relates exclusively to hybrid public authorities, and not core public authorities,<sup>36</sup> is not obviously correct. Thirdly and finally, Lord Mance, with whom Lords Scott and Neuberger agreed, seemed tacitly and more generally to reject the contracting out argument on the footing that the lawful performance of functions for self-serving commercial gain, usually the motivation of contracted out service providers, will “point against” treating those functions as public in nature under s.6(3)(b).<sup>37</sup> In response, this tends to empty s.6(3)(b) of any real purpose as a provision intending to subject certain private persons to Convention standards. As Jonny Landau observes, the blanket exclusion of commercial activity from s.6(3)(b) would even appear, in conflict with Keith J.’s uncontroversial ruling in *R. (A) v Partnerships in Care Ltd*,<sup>38</sup> to exclude from s.6(3)(b) the activities of private psychiatric hospitals exercising statutory coercive powers to detain and treat patients against their will.<sup>39</sup>

The contracting out argument, it is argued, retains its doctrinal force even after *YL*. Whilst this article’s conclusions do not logically compel the conclusion that the contracting out argument is correct, by debunking the rights-stripping idea they nevertheless tend to support it by presenting the hybrid public authority concept in a form less damaging to the existing positions of the bodies caught by s.6(3)(b) and, as a result, potentially riper for judicial or legislative expansion to private contractors than the rights-stripping idea would have implied.

## Interpreting the Strasbourg jurisprudence

It is now possible, with the research case and the implications of this article’s findings explained, to begin demonstrating those findings. This part of the article argues that Strasbourg does not clearly recognise a hybridity doctrine. Private persons do not appear to become governmental organisations upon the performance of public

<sup>33</sup> P. Craig, “Contracting out, the Human Rights Act and the scope of judicial review” (2002) 118 L.Q.R. 551, p.557.

<sup>34</sup> This is the effect of s.6(5) HRA’s reference only to hybrid public authorities.

<sup>35</sup> A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524, p.529.

<sup>36</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [141].

<sup>37</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [116].

<sup>38</sup> [2002] EWHC 529 (Admin), [2002] 1 W.L.R. 2610. Lord Mance referred to and even appeared to approve of the *Partnerships in Care* ruling himself in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [121].

<sup>39</sup> J. Landau, “Functional public authorities after *YL*” [2007] P.L. 630, p.636. See also S. Palmer, “Public functions and private services: a gap in human rights protection” (2008) 6 I.J.C.L. 585, p.601.



functions but, instead, remain private persons through and through.<sup>40</sup> The analysis proceeds in three steps. First, it explains the nature of the public-private scheme in Strasbourg and why the governmental organisation jurisprudence is potentially relevant to the domestic courts' treatment of the public authority concept under s.6 HRA at all. It then introduces and briefly defends the potential utility of what will be referred to as the 'selflessness principle' as an analytical tool with which to help clarify the meaning and scope of the governmental organisation jurisprudence. The third and final stage examines the Strasbourg rulings, applying the selflessness principle to some of them, arguing that in no decided cases can Strasbourg clearly be said to have acknowledged the existence of a hybridity doctrine. This part of the article's overall aim is merely to cast doubt on the idea that Strasbourg recognises such a doctrine. Some of the rulings, it will be seen, are so ambiguous in their reasoning as to prevent a clear picture emerging either way. Inferring a hybridity doctrine from the jurisprudence too readily, however, involves the risk of misclassifying hybrid public authorities as governmental organisations and denying them Convention protection in domestic law when they would have enjoyed such protection in Strasbourg. The burden of proof, which this part argues has not been discharged, falls strongly upon those who believe in the existence of a hybridity doctrine in Strasbourg to demonstrate it convincingly.

#### *The public-private scheme in Strasbourg*

As seen above, art.34 ECHR generates a distinction between governmental organisations and private individuals for the purposes of establishing who can mount Convention claims in Strasbourg. But there is also a second sense, relating to state responsibility, in which Strasbourg must distinguish public from private. On the international plane, there are two ways in which a particular body can engage the state's responsibility if it behaves in a way which affects the enjoyment by a victim of their Convention rights.<sup>41</sup> The state will be straightforwardly responsible for the body's actions if the body is an organ of the state. This will be referred to as 'direct' responsibility. Alternatively, if the body is another private individual rather than an organ of the state, the state will be responsible for the body's actions if the state is under and has breached a positive obligation to take steps to protect the victim from the body's behaviour. This second and subtler form of responsibility will be referred to as 'indirect private' responsibility.

Whether or not the indirect private responsibility jurisprudence can assist the courts in interpreting the term "functions of a public nature" under s.6(3)(b) HRA is unclear. Helen Quane has argued that it can never be of assistance because it would be artificial, she believes, to regard bodies engaging the state's responsibility under the indirect private responsibility principle, such as a prisoner killing a cellmate, as performing 'public' functions in domestic law.<sup>42</sup> By contrast however, as Baroness Hale stated in *YL*:

<sup>40</sup> See also H. Davis, "Public Authorities as 'Victims' under the Human Rights Act" [2005] C.L.J. 315, p.321.

<sup>41</sup> H. Quane, "The Strasbourg jurisprudence and the meaning of 'public authority' under the Human Rights Act" [2006] P.L. 106, pp.107-108.

<sup>42</sup> H. Quane, "The Strasbourg jurisprudence and the meaning of 'public authority' under the Human Rights Act" [2006] P.L. 106, p.108.

“The most effective way for the United Kingdom to fulfil its positive obligation to protect individuals against violations of their rights is to give them a remedy against the violator [under s.6(3)(b)].”<sup>43</sup>

It is unnecessary to express a firm view on the relevance of the indirect private responsibility jurisprudence to s.6(3)(b) for present purposes. It is clear from the very nature of the indirect private responsibility principle that the bodies engaging the state’s responsibility under it are not governmental organisations and, as a result, that they would enjoy Convention rights under art.34 and s.7 HRA whether regarded by s.6(3)(b) as hybrid public authorities or not. Since it allows the author to refine an earlier published view however,<sup>44</sup> it is worth stating some brief observations. In the vast majority of circumstances, Quane’s view that it would be artificial to regard bodies engaging the state’s responsibility in this way will prevail. The normal relevance of indirect private responsibility jurisprudence, as the third part of this article explains in greater detail, is to the nature of the domestic courts’ duties as public authorities to give a certain degree of ‘horizontal effect’ to the Convention by developing the common law compatibly with it.<sup>45</sup> There may nevertheless be isolated circumstances, however, in which indirect private responsibility jurisprudence *could* be relevant to the identification of public functions under s.6(3)(b) HRA. Where the state is placed under a positive obligation to regulate the behaviour of a private individual to whom it is deemed to have delegated either “state powers”<sup>46</sup> or a function for the purpose of ensuring compliance with the state’s Convention<sup>47</sup> or other international law obligations,<sup>48</sup> those delegated functions might more easily be described as ‘public’ in nature under s.6(3)(b).<sup>49</sup> Whether these cases evince a sufficiently developed line of jurisprudence to be of real significance to the courts’ interpretation of the term “functions of a public nature” under s.6(3)(b) however, especially given the ECtHR’s failure to define the term “state powers” clearly, is another matter. Additionally, even if such cases might properly be regarded as relevant to the scope of s.6(3)(b), it is far from clear, in response to the reluctance of Lords Mance and Neuberger in *YL* to interpret s.6(3)(b) as being any broader than the category of activities which would engage the state’s responsibility under such indirect private responsibility rulings,<sup>50</sup> that Parliament would wish to confine the scope of that provision to them.<sup>51</sup> The terminology of “functions of a public nature” employed by s.6(3)(b), unused by Strasbourg in these indirect private responsibility rulings, is specific to the HRA. Moreover, the Court of Appeal has already exceeded

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<sup>43</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [60].

<sup>44</sup> See A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524, p.527, agreeing with Quane.

<sup>45</sup> A. Williams, “*YL v Birmingham City Council*: Contracting out and ‘functions of a public nature’” [2008] E.H.R.L.R. 524, p.527.

<sup>46</sup> *Sychev v Ukraine* (Application No. 4773/02) (unreported), para.54.

<sup>47</sup> *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163, para.29; *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112, para.27.

<sup>48</sup> *Woś v Poland* (2007) 45 E.H.R.R. 28 (the relevant decision is the admissibility decision of March 1, 2005), para.73.

<sup>49</sup> See the discussion by Lord Mance in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [92]-[99].

<sup>50</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [99] (Lord Mance) and [161] (Lord Neuberger).

<sup>51</sup> For criticism of the courts’ tendency to bind themselves to Strasbourg rulings, see e.g. R. Masterman, “Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?” [2004] P.L. 725; J. Lewis, “The European ceiling on human rights” [2007] P.L. 720.

the rulings' scope by applying s.6(3)(b) to a private not-for-profit company established and assisted by a local authority to run a series of farmers' markets, where no discernible delegation by the state to that company for the purpose of performing a Convention or other international obligation had occurred.<sup>52</sup>

Unlike the indirect private responsibility jurisprudence, whose relevance to the interpretation of the term "public authority" under s.6(1) is uncertain, Strasbourg's concepts of the governmental organisation under art.34 and the organ of the state under the direct responsibility principle *are* clearly of some relevance to the courts' interpretation of the public authority concept under s.6 HRA. Like s.6, they also attempt to draw a basic public-private distinction in the Convention context. It is evident from various rulings in which Strasbourg cross-refers between the art.34 and direct responsibility strands of jurisprudence that Strasbourg regards the categories of governmental organisation under art.34 and organs of the state under the direct responsibility principle as identical.<sup>53</sup> The 'governmental organisation' terminology will therefore be used in this article to refer to governmental bodies under each strand of jurisprudence. Whilst the governmental organisation jurisprudence relates loosely to the public authority concept under the HRA, this part argues that it is only relevant to the identification of core and not hybrid public authorities.

#### *The selflessness principle as an analytical tool*

When analysing the nature of the public-private distinction under the governmental organisation jurisprudence, it is sensible to start by examining the distinction between core public authorities and private persons under s.6 HRA. In *Aston Cantlow v Wallbank*, which concerned the status under s.6 of a Parochial Church Council (PCC) seeking to enforce chancel repair liability against the defendants, their Lordships believed the core public authority and governmental organisation categories of bodies to be coterminous. As Lord Hope stated with the agreement of the remaining members of the Appellate Committee:<sup>54</sup>

"The test as to whether a person or body is or is not a 'core' public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other."<sup>55</sup>

Useful guidance as to the meaning of the governmental organisation concept might therefore be found by examining the nature of core public authorities. A basic institutional dichotomy can be identified between core public authorities and private persons in domestic law: generally, core public authorities such as central and local government organisations "are regarded as being under duties to act *only* in the public

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<sup>52</sup> *R. (Beer) v Hampshire Farmers' Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 W.L.R. 233.

<sup>53</sup> *Danderyds Kommun v Sweden* (Application No. 52559/99) (unreported), applied in that respect in the Scottish case of *Grampian University Hospitals NHS Trust v Napier* 2004 J.C. 117; *Hautaniemi v Sweden* (1996) 22 E.H.R.R. C.D.155; *Novoseletskiy v Ukraine* (2006) 43 E.H.R.R. 53, para.82.

<sup>54</sup> See *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [6]-[7] (Lord Nicholls), [160] (Lord Rodger), [129] (Lord Scott) and [87] (Lord Hobhouse).

<sup>55</sup> *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [47].

interest as they perceive it to be”,<sup>56</sup> in a way that private persons, who by contrast are generally entitled to act for profit or in the interests of shareholders, are not. Various factors might suggest that a body is a core public authority. Although none are of themselves conclusive, they include the exercise of ‘authority’ itself by the possession of special or coercive powers, public funding, a statutory basis and democratic accountability.<sup>57</sup> The institutional dichotomy between core public authorities and private persons (herein referred to as the ‘selflessness principle’) serves as a useful analytical tool by illustrating the basic and necessary ‘selflessness’ of core public authorities as contrasted with the lawful ‘selfishness’ of institutionally private persons. The latter are free to do anything which the law does not expressly prohibit,<sup>58</sup> with the possible exception of charities and fiduciaries,<sup>59</sup> they should be readily recognisable, according to the principle, by their ability and inclination in domestic law to serve themselves over anyone else. The selflessness principle appears to form the basis of their Lordships’ observations on the nature of the core public authority concept in *Aston Cantlow*,<sup>60</sup> which implicitly suggests that the same principle also

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<sup>56</sup> D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476, pp.483-484 (emphasis original). For a similar statement in a more theoretical setting, see J. Raz, *The Morality of Freedom* (OUP, Oxford, 1986), p.5. Oliver is not necessarily correct to suggest, as she does at p.484, that private persons must be under duties to perform certain functions in the public interest before those functions can be regarded as public in nature under s.6(3)(b), however. *Some* public functions may involve this duty. For instance, a private psychiatric hospital exercising the statutory power to detain and treat mental inpatients, which Keith J ruled was a public function under s.6(3)(b) in *R. (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 W.L.R. 2610, must obviously exercise this function in the interests of the patient or the public and not, absent these interests, in its commercial interests alone: see the Mental Health Act 1983, ss 3(2)(c), 2(2)(b), 4(2) and 5(4)(a). But the commercial provision of public services on a core public authority’s behalf will not involve such a duty. It is difficult to see why all public functions under s.6(3)(b) should necessarily share a common conceptual basis given the nebulousness of the drafting of that provision. The idea that a universal basis exists, however intellectually appealing the idea may be, is probably a chimera.

<sup>57</sup> D. Oliver, “The frontiers of the State: public authorities and public functions under the Human Rights Act” [2000] P.L. 476, pp.481-483.

<sup>58</sup> *R. v Somerset County Council, ex p Fewings* [1995] 1 All E.R. 513 (Q.B.), p.524 (Laws J.); *R. (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [72] (Stanley Burnton J.).

<sup>59</sup> Whilst charities act for others, they might nevertheless be capable of description as selfish bodies given that they act in accordance with voluntarily-assumed charitable objectives “rather than in the public interest more generally”: C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (OUP, Oxford, 2007), p.113. The same might also be said of fiduciaries. If fiduciaries could not properly be described as selfish rather than selfless actors however, it is unclear to what extent it would be unacceptable for fiduciary functions to fall within s.6(3)(b) given the uncertainty over the ambit and rationale of the fiduciary principle. It has even been suggested that the principle “is informed in some measure by considerations of public policy aimed at preserving the integrity and utility of these relationships... given the purposes they serve in society”: P. Finn, “Fiduciary Law and the Modern Commercial World”, in E. McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (OUP, Oxford, 1992) p.7, at p.10. Hence, it would not be self-evidently improper to impose upon fiduciaries an additional obligation to act compatibly with the Convention.

<sup>60</sup> Oliver’s work was described as “valuable” by Lord Nicholls: *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [7]. Rejecting the argument that the PCC was a core public authority, Lord Nicholls observed, at [14], that it was “a church body engaged in self-governance and the promotion of its own affairs” (emphasis added). Along the same lines, Lord Hope emphasised, at [62], that churches’ activities concern “purely internal matters which do not reach out into the sphere of the state”, Lord Hobhouse that the PCC acts for the “diocese and the congregation of believers in the parish” voluntarily coming to it, at [86], and, at [156], Lord Rodger stated that the PCC exists “to accomplish

underlies the distinction between governmental organisations and private persons in Strasbourg. As an obvious indicator of that principle in operation, the ECtHR has ruled on two occasions that bodies are not governmental organisations if they possess predominantly self-serving commercial motives.<sup>61</sup> Taking state responsibility and art.34 rulings in turn, the following analysis examines significant Strasbourg rulings which might be thought to evince a hybridity doctrine, employing the selflessness principle where appropriate to help rationalise them and criticise the idea that private persons performing public or governmental functions are regarded as governmental organisations in Strasbourg.

#### *Analysing the Strasbourg jurisprudence- state responsibility rulings*

In *Appleby v United Kingdom*,<sup>62</sup> a private shopping centre owner had refused the applicants permission to assemble at the centre to petition the public on a local planning issue. The applicants alleged breaches of arts 10 and 11 ECHR, which guarantee the rights to freedom of expression and assembly respectively. The ECtHR held that the owner, a private company and transferee of the property from a public development corporation, did not engage the UK's responsibility under either the direct<sup>63</sup> or indirect private<sup>64</sup> responsibility principles. *Appleby* has been interpreted as suggesting that a private body's actions can sometimes engage the state's responsibility under the direct responsibility principle,<sup>65</sup> but this is difficult to reconcile with the court's resilience to further argument, having observed that the alleged interference emanated from an institutionally private actor, as to why that actor should nevertheless be regarded as a governmental organisation.<sup>66</sup> Additionally, if the court did accept that a private body could sometimes engage the state's responsibility under the direct responsibility principle, it gave no indication as to how.

*Costello-Roberts v United Kingdom*,<sup>67</sup> which has previously been interpreted as a direct responsibility ruling evincing a hybridity doctrine,<sup>68</sup> concerned the UK's responsibility for the actions of the headmaster of a private school in administering corporal punishment to a pupil. The pupil alleged the breach of the rights to freedom from inhuman and degrading treatment and to private life under arts 3 and 8 ECHR. Despite finding no breach of the Convention, the ECtHR ruled that the private school

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the Church's own mission, not the aims and objectives of the government". Lord Scott declared himself, at [129], to be "in complete agreement" with Lords Hope and Rodger.

<sup>61</sup> *Islamic Republic of Iran Shipping Lines v Turkey* (2008) 47 E.H.R.R. 24, para.73; *Ukraine-Tyumen v Ukraine* (Application No. 22603/02) (unreported), para.27.

<sup>62</sup> (2003) 37 E.H.R.R. 38.

<sup>63</sup> *Appleby v United Kingdom* (2003) 37 E.H.R.R. 38, para.41.

<sup>64</sup> *Appleby v United Kingdom* (2003) 37 E.H.R.R. 38, paras 49-50.

<sup>65</sup> H. Quane, "The Strasbourg jurisprudence and the meaning of 'public authority' under the Human Rights Act" [2006] P.L. 106, p.113. Quane seems to present the *Appleby* ruling as rejecting the claim, on the facts, that "the simple transference of assets from public to private bodies will... engage the [direct] responsibility of the state for the actions of the private bodies" (p.113), rather than as rejecting the underlying principle that private bodies may engage the state's responsibility in this way.

<sup>66</sup> *Appleby v United Kingdom* (2003) 37 E.H.R.R. 38, para.41.

<sup>67</sup> *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112.

<sup>68</sup> Quane evidently interprets the ECtHR's ruling in *Costello-Roberts* as a direct responsibility ruling because she believes the ruling to be instructive in determining the meaning of "functions of a public nature" under s.6(3)(b), having earlier argued that indirect private responsibility jurisprudence can never be relevant to the domestic courts' treatment of that provision: see H. Quane, "The Strasbourg jurisprudence and the meaning of 'public authority' under the Human Rights Act" [2006] P.L. 106, pp.108 and 110.

engaged the state's responsibility. To support its conclusion, the court observed that states were required "to secure to children their right to education" by art.2 of the First Protocol to the Convention, that disciplinary functions were not "merely ancillary to the educational process", that independent schools "co-exist with a system of public education" in the United Kingdom, and that "the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals".<sup>69</sup> The case does not clearly evince a hybridity doctrine, it is argued, because it is not clearly a direct responsibility ruling dealing with the governmental organisation concept at all. In *YL*, Lord Mance described *Costello-Roberts* as "not an easy case to analyse"<sup>70</sup> before noting that the ECtHR in *Storck v Germany*<sup>71</sup> saw it as a judgment based on the principle of indirect private responsibility rather than direct responsibility. Lord Mance's reading more accurately reflects the tenor of the *Costello-Roberts* judgment, in which the ECtHR began the relevant analysis by emphasising that states can be under positive obligations to regulate private activity.<sup>72</sup> The state, it would seem, was responsible for the school not because it was a governmental organisation but, instead, via the positive obligation doctrine, because it was a private body performing the delegated function of assisting the state to secure its Convention obligation to provide education by disciplining school pupils.

In *Van der Mussele v Belgium*,<sup>73</sup> a pupil advocate alleged the breach of the right to freedom from forced labour under art.4 ECHR when compelled by the institutionally independent Belgian Order of Advocates to provide free legal services to indigent persons. Despite finding no breach of the Convention, the ECtHR rejected the government's prior submission that Belgium could not be responsible for the actions of the Order of Advocates. The court advanced two main points. First, the obligation upon the state to provide legal assistance to indigent persons derived from art.6 ECHR, and Belgium had chosen to ensure its compliance with that obligation by compelling the Order to compel advocates to undertake the work, which solution could not "relieve the Belgian state of the responsibilities it would have incurred... had it chosen to operate the system itself."<sup>74</sup> Secondly, the Order of Advocates was "associated with the exercise of judicial power", created by legislation and "endowed with legal personality in public law".<sup>75</sup> Along *Costello-Roberts* lines, the first point implies that the Order of Advocates was a private body that engaged the state's responsibility by performing a function delegated to it by the state to ensure the state's compliance with its art.6 obligation to provide free legal assistance. The second point is significant because it suggests that the Order of Advocates was a body created and controlled to serve the public interest, which according to the selflessness principle would indicate its status as a governmental organisation. When taken together, points one and two might therefore be thought to evince a hybridity doctrine by suggesting that the body was a governmental organisation *precisely because* it was a private person performing the 'delegated' function in question. In response however, it is not

<sup>69</sup> *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112, paras 27-28.

<sup>70</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [95].

<sup>71</sup> (2006) 43 E.H.R.R. 6.

<sup>72</sup> *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112, para.26.

<sup>73</sup> *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163.

<sup>74</sup> *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163, para.29. This reasoning broadly resembles that in *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112, where the ECtHR, at para.27, relied on *Van der Mussele* to support its argument that the state was responsible for the actions of the private school.

<sup>75</sup> *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163, para.29.

clear that the two points advanced by the court were intended to be read in this way. At the very least, the suggestion that private persons were regarded as governmental organisations in Strasbourg by performing these delegated functions would sit uncomfortably with the later ruling in *Costello-Roberts* which, as seen above, appears to treat such persons not as governmental organisations but instead as private individuals who engage the state's responsibility through the indirect private responsibility doctrine.<sup>76</sup> The court in *Van der Musselle* should be taken, instead, as seeking to advance alternative arguments to the effect that the body *either* engaged the state's responsibility under the indirect private responsibility principle by performing delegated Convention obligations *or* that it did so as a governmental organisation under the direct responsibility principle by virtue of its status as a 'selfless' body created and controlled by the state to regulate the relevant arm of the Belgian legal profession.

One final case warrants analysis. In *Sychev v Ukraine*,<sup>77</sup> the ECtHR held that a liquidation commission empowered to execute judgments against a liquidated state-owned company engaged the state's responsibility in respect of an art.6 claim by the applicant when it failed to execute judgments in a timely manner. The court stated as follows:

"The Court does not find it necessary to embark on a discussion of whether the liquidation commission was or was not itself a State authority for the purposes of Article 34 § 1 of the Convention. It suffices to note that the body in question exercised certain state powers at least in the execution of court judgments."<sup>78</sup>

The distinction between "State authority" and other bodies exercising "state powers" may appear, as Lord Mance remarked in *YL*, to "mirror" the distinction between core and hybrid public authorities under the HRA.<sup>79</sup> Despite the reference in the above passage to governmental organisations under art.34 ECHR however, it is important to note, as Lord Mance observed, that the language of the judgment as a whole suggests the liquidation commission to have engaged the state's responsibility as a private person under the indirect private responsibility principle rather than as a governmental organisation.<sup>80</sup> Not decided on the basis of the direct responsibility principle therefore, *Sychev* does not clearly demonstrate that private bodies exercising state powers become *governmental organisations* in Strasbourg.

#### *Analysing the Strasbourg jurisprudence- Article 34 rulings*<sup>81</sup>

In *Radio France v France*,<sup>82</sup> the applicants alleged the breach of arts 6, 7 and 10 ECHR after encountering domestic sanction in the law of defamation for broadcasting

<sup>76</sup> Further support for this point can be found in *Sychev v Ukraine* (Application No. 4773/02) (unreported), paras 53-54.

<sup>77</sup> *Sychev v Ukraine* (Application No. 4773/02) (unreported).

<sup>78</sup> *Sychev v Ukraine* (Application No. 4773/02) (unreported), para.54.

<sup>79</sup> *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [98].

<sup>80</sup> See *Sychev v Ukraine* (Application No. 4773/02) (unreported), paras 53-54; *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95 at [97]-[98].

<sup>81</sup> The article does not analyse *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1. Quane believes it to be instructive in interpreting "functions of a public nature" under s 6(3)(b) HRA: H. Quane, "The Strasbourg jurisprudence and the meaning of 'public authority' under the Human Rights Act" [2006] P.L. 106, p.115. However, this is based on the erroneous belief that Strasbourg jurisprudence was used to interpret s.6(3)(b) in *Aston Cantlow*. As seen above, their Lordships appeared to see the relevance of Strasbourg jurisprudence only to the *core* public authority concept.

damning stories about the former deputy mayor of Paris. The ECtHR held Radio France, a state-financed radio broadcaster, to be a non-governmental organisation capable of filing an art.34 complaint. The court stated in its analysis that the phrase ‘governmental organisation’ applies not only to central state organs, “but also to decentralised authorities”, such as local authorities, exercising “public functions”.<sup>83</sup> It then stated that this was also true of “public-law entities other than territorial authorities”.<sup>84</sup>

The court drew from the two Commission cases of *Consejo General*<sup>85</sup> and *RENFE v Spain*<sup>86</sup> during its analysis. In *Consejo General*, the Commission held that the General Council of Official Economists’ Associations (GCOEA), a professional regulatory body created by statute, was a governmental organisation under art.34 because it was a “national authority exercising public functions”.<sup>87</sup> In *RENFE*, the Commission held the Spanish National Railway provider to be a governmental organisation due to its status as a public law organisation created by law, its accountability to government, the legal control on its internal structure and activities and its position as the sole railway provider.<sup>88</sup> *Radio France*, *Consejo General* and *RENFE* are said to reveal that a body:

“may be regarded as a governmental organisation when it has special powers conferred on it by the state such as an operating monopoly, when legislation confers official duties on it, or when it is subject to a high degree of control by the state.”<sup>89</sup>

However, despite the use of the term “public functions” – similar to that used in s.6(3)(b) HRA – by the Commission in *Consejo General*, it is not clear that either of the governmental organisations in *Consejo General* and *RENFE* were *private* persons performing those functions. The GCOEA in *Consejo General* resembled a ‘selfless’ body established by law to regulate a particular profession. The Spanish National Railway provider in *RENFE* may have enjoyed administrative autonomy, but this does not of itself demonstrate its institutionally *private* nature,<sup>90</sup> especially since it was also created by law and accountable to government.

Interestingly, the Commission in *Consejo General* stated that the GCOEA, being a governmental organisation, “could not *at any time*” assert Convention rights by

<sup>82</sup> (2005) 40 E.H.R.R. 29 (the ruling relevant for present purposes is the admissibility decision of September 23, 2003).

<sup>83</sup> *Radio France v France* (2005) 40 E.H.R.R. 29 (the ruling relevant for present purposes is the admissibility decision of September 23, 2003), para.26.

<sup>84</sup> *Radio France v France* (2005) 40 E.H.R.R. 29 (the ruling relevant for present purposes is the admissibility decision of September 23, 2003), para.26. Quane believes the use of the term “territorial authority” to reveal a hybridity doctrine in Strasbourg: H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.118. This is an ambitious extrapolation given that the court gave no useful indication as to what it meant when employing the term.

<sup>85</sup> *Consejo General de Colegios Oficiales de Economistas de España v Spain* (1995) D.R. 82-B.

<sup>86</sup> *RENFE v Spain* (1997) D.R. 90-B.

<sup>87</sup> *Consejo General de Colegios Oficiales de Economistas de España v Spain* (1995) D.R. 82-B.

<sup>88</sup> *RENFE v Spain* (1997) D.R. 90-B.

<sup>89</sup> H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.118.

<sup>90</sup> *Danderyds Kommun v Sweden* (Application No. 52559/99) (unreported). Here, a Swedish municipal council, despite being “an independent legal person, acting in its own capacity”, was a governmental organisation under art.34.



making an art.34 application.<sup>91</sup> The implication of this is that either the organisation in *Consejo General* was what the HRA would regard as a core public authority (these bodies, “inherently incapable” of description as non-governmental organisations under art.34, are unable to enforce their own Convention rights),<sup>92</sup> or it was what the HRA would regard as a hybrid public authority but was prevented from ever invoking its own Convention rights because it *sometimes* exercised public functions.<sup>93</sup> Advocating the relevance of the governmental organisation jurisprudence to the interpretation of s.6(3)(b), Quane believes the former conclusion to be incongruent with passages in *Aston Cantlow* urging a narrower interpretation of the core public authority category as compared to the hybrid category and consequently settles on the latter conclusion that the body was what the HRA would regard as a hybrid public authority.<sup>94</sup> She notes however that the Commission’s view that the body could *never* invoke its own ECHR rights sits uncomfortably with the idea implied by s.6(5) HRA that hybrid public authorities should be able to invoke the Convention in their private capacities, and encourages Strasbourg to reconsider its remarks in *Consejo General*.<sup>95</sup>

Especially given this article’s arguments, the obvious and compelling answer to this conundrum is to regard the GCOEA, and indeed any other bodies regarded by Strasbourg as governmental organisations, only as core public authorities under s.6 HRA. Cases other than *Consejo General* take the view that governmental organisations can never invoke their own ECHR rights.<sup>96</sup> Far from suggesting the reconsideration of *dicta* in a single decision, Quane would appear to be urging Strasbourg to rethink its interpretational attitudes to art.34 on a more general level. The governmental organisation jurisprudence should not be shoehorned into the hybrid public authority concept under s.6(3)(b) in this way.

### Summary

Considering the Strasbourg jurisprudence concerning both state responsibility and art.34 ECHR, it is far from clear that Strasbourg recognises a hybridity doctrine. Some private individuals may engage the state’s responsibility by exercising functions or “state powers” delegated to them by the state for the purpose of ensuring full or partial compliance with the state’s Convention or other international obligations.<sup>97</sup> These functions, for the purpose of allowing a remedy against such bodies in domestic law, might even be capable of classification as “functions of a public nature” under s.6(3)(b) HRA. Crucially however, such bodies engage the state’s responsibility not as

<sup>91</sup> *Consejo General de Colegios Oficiales de Economistas de España v Spain* (1995) D.R. 82-B (emphasis added).

<sup>92</sup> *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [8] (Lord Nicholls).

<sup>93</sup> H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.117.

<sup>94</sup> H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.117.

<sup>95</sup> H. Quane, “The Strasbourg jurisprudence and the meaning of ‘public authority’ under the Human Rights Act” [2006] P.L. 106, p.117.

<sup>96</sup> *Danderyds Kommun v Sweden* (Application No. 52559/99) (unreported); *RENFE v Spain* (1997) D.R. 90-B; *16 Austrian Communes and some of their councillors v Austria* (Application Nos 5767/72 and 5922/72) (unreported); *Rothenthurm Commune v Switzerland* (Application No. 13252/87) (unreported).

<sup>97</sup> See *Van der Mussele v Belgium* (1984) 6 E.H.R.R. 163; *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112; *Sychev v Ukraine* (Application No. 4773/02) (unreported); *Woś v Poland* (2007) 45 E.H.R.R. 28 (the relevant decision is the admissibility decision of March 1, 2005).

governmental organisations but as private persons under the indirect private responsibility principle.

### **Ensuring Convention protection for hybrid public authorities**

The foregoing analysis reveals that the governmental organisation concept cannot convincingly be said to extend to private persons performing public functions. The result is that hybrid public authorities, as private persons performing public functions under s.6(3)(b), retain the ability to rely on their own Convention rights under art.34 ECHR and s.7 HRA, even during the performance of those public functions. The HRA provides for the rights-stripping idea neither explicitly nor, therefore, by necessary implication.

This part of the article considers the practical issue of how to guarantee that hybrid public authorities retain the same ability to rely on the Convention when performing public functions that they would enjoy when acting privately. It proceeds in two stages. The first stage explains the existing mechanisms by which ‘ordinary’ private persons, i.e. persons who do not perform any public functions under s.6(3)(b), can rely on the Convention both offensively and defensively in domestic law. Its purpose is to illustrate how hybrid public authorities would be able to rely on the Convention in their private capacities under the HRA. The second stage then examines how hybrid public authorities might be guaranteed the same opportunity to do so when performing public functions. Whilst this will be for the most part straightforward, hybrid public authorities encounter a potential obstacle, as will be explored, when trying to rely on the Convention defensively against other private individuals during the performance of public functions. After considering potential solutions to the problem, this part argues that the most effective way to safeguard the rights of hybrid public authorities in this situation is to read the hybrid public authority concept as generating chameleonic horizontal effect.

#### *Private individuals and indirect horizontal effect*

Bodies satisfying the standing requirements of art.34, it is recalled, are regarded by the HRA as ‘victims’ capable of enforcing their Convention rights against public authorities in domestic law.<sup>98</sup> A victim can deploy their Convention rights against a public authority in two ways. First, a victim can rely *vertically* on their Convention rights, using them either as a ‘sword’ to form the basis of a cause of action against the relevant public authority under s.7(1)(a) HRA, or as a ‘shield’, by relying on those rights under s.7(1)(b) by way of collateral challenge against a public authority initiating proceedings against them.<sup>99</sup> Secondly, and because s.7(1)(b) allows victims to “rely [against a public authority] on the Convention right or rights concerned in *any* legal proceedings”,<sup>100</sup> and because courts and tribunals are public authorities under the HRA,<sup>101</sup> the possibility exists of a victim asserting their rights against the court hearing a dispute to which the victim is a party, even if the other party to that dispute is also a private individual rather than a public authority. The court’s duty to act compatibly with the Convention may therefore require it to allow a victim to deploy their rights to the detriment of the other private party to the dispute, thus generating a

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<sup>98</sup> HRA, ss 7(1) and 7(7).

<sup>99</sup> The “collateral challenge” terminology is borrowed from *Boddington v British Transport Police* [1999] 2 A.C. 143, [1998] 2 W.L.R. 639.

<sup>100</sup> Emphasis added.

<sup>101</sup> HRA, s.6(3)(a).

form of “horizontal effect” of those rights against another private individual.<sup>102</sup> This mechanism of horizontal effect, commonly known as ‘indirect’ horizontal effect, bears two key characteristics. First, it involves formally asserting Convention rights against the court as a public authority, rather than against the other private party to the dispute. Second, it must take place through the medium of an existing cause of action advanced by the claimant. The HRA does not provide victims with a direct cause of action against other private individuals because it is only unlawful for public authorities to act incompatibly with the Convention under s.6(1) HRA.<sup>103</sup> Absent the possibility of a victim deploying the interpretative obligation under s.3 to enforce his or her rights indirectly against another private individual (which is not considered here),<sup>104</sup> the only way in which a victim can assert their rights against an ‘ordinary’ private individual not acting as a hybrid public authority is through the indirect horizontal effect mechanism.

There are two key issues for a victim wishing to take advantage of the horizontal effect mechanism as a ‘sword’ to enforce their rights indirectly against another private individual in this way. First, since this mechanism of horizontal effect depends partly upon the court’s duty as a public authority, the victim must establish that the court’s refusal to allow the victim to deploy their Convention right indirectly against the defendant private party to the dispute would actually amount to a violation of that Convention right.<sup>105</sup> This is where the indirect private responsibility jurisprudence has its natural home, because that jurisprudence prescribes the extent to which states must protect victims by taking positive steps to regulate the conduct of other private individuals.<sup>106</sup> The second issue, once it has been established that the failure to allow the victim to deploy his or her Convention right indirectly against the defendant would amount to a violation of that right, is the extent to which the court’s duty to act compatibly with the Convention requires *the court*, rather than Parliament, to take steps to safeguard the victim’s right.<sup>107</sup> This issue, or more precisely the issue of the extent to which courts of binding precedent are required by s.6 HRA to develop the common law consonantly with the Convention, is a distinct and contested issue<sup>108</sup> on

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<sup>102</sup> The “horizontal effect” terminology is taken from M. Hunt, “The ‘horizontal effect’ of the Human Rights Act” [1998] P.L. 423.

<sup>103</sup> Cf W. Wade, “Horizons of Horizontality” (2000) 116 L.Q.R. 217, arguing that courts are required by s.6 HRA to create new rights-based causes of action between private individuals. This view has since been judicially discredited: see e.g. *X v Y* [2004] EWCA Civ 662, [2004] I.C.R. 1634 at [54] (Mummery L.J.); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 at [132] (Baroness Hale).

<sup>104</sup> The focus of this article is on the deployment of rights, through s.6 HRA, against public authorities. Section 3 does not of itself provide a rights-based cause of action against other bodies, public or private, and will only apply in existing disputes if a relevant statutory provision would expressly or by necessary implication interfere with a victim’s rights according to ordinary principles of statutory construction: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557 at [30] (Lord Nicholls) and [67] (Lord Millett) (dissenting).

<sup>105</sup> G. Phillipson, “Clarity postponed: horizontal effect after *Campbell*” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge, 2007), p.149.

<sup>106</sup> G. Phillipson, “Clarity postponed: horizontal effect after *Campbell*” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge, 2007), p.149.

<sup>107</sup> G. Phillipson, “Clarity postponed: horizontal effect after *Campbell*” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge, 2007), p.150.

<sup>108</sup> For competing academic views, see W. Wade, “Horizons of Horizontality” (2000) 116 L.Q.R. 217 and the polar opposite view of R. Buxton, “The Human Rights Act and private law” (2000) 116 L.Q.R.

which judges do not yet seem to have reached a firm consensus.<sup>109</sup> It is not necessary to attempt to resolve this issue here. For present purposes, it suffices to observe that the courts' duties as public authorities do require them to engage in *some* Convention-friendly common law development,<sup>110</sup> but that this duty does not require the creation of new common law causes of action to allow victims to assert their Convention rights against private defendants.<sup>111</sup> Hence, a victim seeking to take advantage of the Convention's indirect horizontal effect must first plead a pre-existing common law cause of action before attempting to persuade the court hearing the dispute to discharge its duty as a public authority by developing that cause of action in a way which safeguards his or her Convention right.<sup>112</sup>

The foregoing, it is emphasised, represents a description of how a private claimant might use the indirect horizontal effect mechanism as a *sword* against a private defendant to a dispute which is already underway. Nothing has been said so far, however, of the Convention rights of the private defendant in this situation. As a private individual, the defendant would also qualify as a 'victim' capable of asserting its rights "in any legal proceedings" against a public authority,<sup>113</sup> including a court,<sup>114</sup> which it claims to have violated them. It is therefore open for the private defendant to deploy its rights as a *shield* against the private claimant, by making the counter-claim against the court that the action proposed by the court to discharge its s.6 duty to the claimant, if carried through, would violate the defendant's own Convention rights. The precise mechanics of how the defendant advances such a counter-claim are slightly more complex, obscured as they are by the overwhelmingly dominant context of media freedom and breach of confidence in which the common law horizontal effect issue has arisen. This is a unique context which involves the contention by a claimant that the defendant media organisation has behaved (or would behave)<sup>115</sup> in a way which in substance results in the violation of one or more of the claimant's Convention rights, typically but not exclusively the right to privacy under art.8 ECHR.<sup>116</sup> The claimant then asks the court to grant relief in his or her favour so as to prevent or remedy the violation. Since the court is considering whether to grant relief that "might affect the exercise of the [media organisation's] Convention right to freedom of expression,"<sup>117</sup> the duty immediately arises upon the court, *by virtue of* s.12(4) HRA, "to have particular regard to the Convention right to freedom of

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48. The more realistic mid-way positions are those of M. Hunt, "The 'horizontal effect' of the Human Rights Act" [1998] P.L. 423 and G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 M.L.R. 824.

<sup>109</sup> See the commentary in G. Phillipson, "Clarity postponed: horizontal effect after *Campbell*" in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge, 2007), p.143.

<sup>110</sup> This is evident, for example, from the courts' decisions in *Douglas v Hello!* [2001] 2 W.L.R. 992, [2001] Q.B. 967 (C.A.) and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457.

<sup>111</sup> See *X v Y* [2004] EWCA Civ 662, [2004] I.C.R. 1634 at [54] (Mummery L.J.); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 at [132] (Baroness Hale). See also G. Phillipson, "Clarity postponed: horizontal effect after *Campbell*" in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge, 2007), p.152.

<sup>112</sup> As in *Douglas v Hello!* [2001] 2 W.L.R. 992, [2001] Q.B. 967 (C.A.) and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457.

<sup>113</sup> HRA, s.7(1)(b).

<sup>114</sup> HRA, ss 6(1) and 6(3)(a).

<sup>115</sup> See *Venables and Thompson v Newsgroup Newspapers Ltd* [2001] 2 W.L.R. 1038, [2001] Fam 430.

<sup>116</sup> The claimants in *Venables* also relied on arts 2 and 3 ECHR.

<sup>117</sup> HRA, s.12(1).

expression”, as protected by art.10 ECHR. The court must then undertake a balancing exercise between the right asserted by the claimant, on the one hand, and the defendant’s right to free expression, on the other, deciding which enjoys the stronger claim overall to protection.<sup>118</sup>

However, outwith the media freedom context, where the s.12(4) injunction to courts to consider the private defendant’s Convention right is missing, it is nevertheless sufficiently clear that a private defendant, at least where the claimant is seeking to rely on a qualified Convention right which allows a proportionate restriction on that right to occur for the protection of the Convention rights of others, would enjoy the general ability to deploy its own Convention rights as a shield by drawing attention to the qualification and arguing that the “rights of others” includes *its* rights. Take the following example. Catherine, who has been forcibly evicted from Deborah’s shop as a trespasser, wishes to complain of a violation of the right to freedom of assembly under art.11 ECHR (let us presume that no other claim is open to her). She sues Deborah in tort, alleging battery. When in court, Catherine seeks to persuade the court to interpret the common law on battery consonantly with art.11 ECHR. But art.11(2) allows for restrictions on the right to freedom of assembly to occur if they “are prescribed by law and are necessary in a democratic society... for the protection of the rights and freedoms of others.” Deborah therefore responds, using her right to respect for property under art.1 of the First Protocol, that the court is not obliged to uphold Catherine’s proffered interpretation of the law on battery, *either* because the court’s failure to do so would amount to a ‘restriction’ by the court on Catherine’s right to freedom of assembly, and that such a restriction could be justified according to the “rights and freedoms of others” by reference to the proportionate protection of Deborah’s Convention right by the court, *or*, on the other hand, because the court’s obligation to act compatibly with Catherine’s art.11 right has arisen due to a positive obligation upon the state to regulate Deborah’s behaviour in these circumstances, and that this obligation must be balanced against other factors which include the qualifications under art.11(2) and therefore Deborah’s Convention right to respect for property.<sup>119</sup> It may not always be clear which of these avenues would necessitate the balancing by the court of the rights asserted by claimant and defendant. The issue would depend essentially on why the state’s obligation to regulate Deborah’s behaviour for Catherine’s sake had arisen in the first place, i.e. whether the obligation existed because the court would engage the state’s responsibility under the direct responsibility principle by failing to protect Catherine’s Convention right in these circumstances, on the one hand, or because *Deborah herself* would engage the state’s responsibility under the indirect private responsibility principle, due to the existence upon the state of a positive obligation to regulate her behaviour for Catherine’s benefit, on the other. The distinction between direct responsibility and responsibility deriving from positive obligations is at times obscured by Strasbourg’s unwillingness to reveal the precise basis upon which it decides a state’s responsibility. The ECtHR sometimes prefers instead to assert that the technical distinction between negative and

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<sup>118</sup> See e.g. *Venables and Thompson v Newsgroup Newspapers Ltd* [2001] 2 W.L.R. 1038, [2001] Fam 430; *Douglas v Hello!* [2001] 2 W.L.R. 992, [2001] Q.B. 967 (C.A.); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457.

<sup>119</sup> When evaluating “the fair balance that has to be struck between the competing interests of the individual and the community as a whole” in relation to a positive obligation upon the state, “the aims mentioned in the second paragraph [of a qualified right]... may be of a certain relevance.”: *López Ostra v Spain* (1995) 20 E.H.R.R. 513, para.51; *Novoseletskiy v Ukraine* (2006) 43 E.H.R.R. 53, para.69.

positive obligations is insignificant; according to the court, the principles applicable to each basis of responsibility when determining whether the state has violated its obligations are similar:

“In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation”.<sup>120</sup>

Nevertheless, whichever avenue is relevant in a given case, it would seem clear either way that if a claimant in an existing dispute does seek to rely on a qualified right by using the indirect horizontal effect mechanism against a private defendant, that private defendant would enjoy the general opportunity to respond to the court that it would violate one or more of the *defendant's* Convention rights to allow the claimant to do so.<sup>121</sup> Whether the right(s) of the claimant or defendant prevailed would then depend on the outcome of the judicial balancing exercise which would take place between them.

#### *Hybrid public authorities and ‘chameleonic’ horizontal effect*

Having analysed the routes by which ordinary private persons and hybrid public authorities acting privately can deploy their Convention rights in domestic law, the issue arises of how to ensure that these routes remain open to hybrid public authorities during the performance of their public functions under s.6(3)(b) HRA. There are four ways, it is recalled, in which a hybrid public authority acting privately could deploy its Convention rights: *vertically*, as either a sword or a shield against a public authority, and *horizontally*, again as either a sword or a shield, indirectly against another private individual via the court as a public authority.

Ensuring the hybrid public authority’s ability to mount *vertical* challenges during the performance of its public functions would be relatively straightforward. Quite simply, the performance of public functions by the hybrid public authority, whether it was seeking to deploy its Convention rights vertically as a sword or a shield, would be irrelevant to its ability to do so. Taking the facts of *Jain v Trent Strategic Health Authority*<sup>122</sup> as an example, if a private care home operator’s business is ruined when a health authority applies to court to revoke the operator’s operating licence without giving adequate notice of the proceedings, the operator should be permitted to allege that the health authority’s actions breached art.1 of the First Protocol and art.6 of the Convention, whether or not the operator happened to be a hybrid public authority performing public functions under s.6(3)(b) HRA by delivering contracted out care services on behalf of a local authority at the time.<sup>123</sup> The same would also be true if the hybrid public authority sought to rely on its Convention rights *horizontally* as a

<sup>120</sup> *López Ostra v Spain* (1995) 20 E.H.R.R. 513, para.51; *Novoseletskiy v Ukraine* (2006) 43 E.H.R.R. 53, para.69. Cf the earlier approach in *Marckx v Belgium* (1979-80) 2 E.H.R.R. 330, at para.31: in the context of Art 8, the lack of an identifiable “interference” by a public authority means that “a law that fails to satisfy [the positive obligation to facilitate a child’s integration into its family]... violates paragraph 1 of Article 8 *without there being any call to examine it under paragraph 2*” (emphasis added).

<sup>121</sup> On this, see *Douglas v Hello!* [2001] 2 W.L.R. 992, pp.993-994 (Brooke L.J.), 1005 and 1006 (Sedley L.J.) and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 at [114] (Lord Hope) and [159] (Baroness Hale).

<sup>122</sup> [2009] UKHL 4, [2009] 1 A.C. 853.

<sup>123</sup> The claimants in *Jain* were unable to make this claim because the HRA was not in force at the time of the health authority’s application to revoke their operating licence.

*sword* by seeking to persuade the court to interpret an existing cause of action consonantly with its Convention rights during a dispute with a private defendant which was already underway. Domestic courts would simply need to refrain from treating the hybrid public authority as anything other than an ordinary private person in these circumstances.

Ensuring that hybrid public authorities can rely on their Convention rights *horizontally* as a *shield*, however, is more complex. It is best guaranteed, it is argued, by reading the hybrid public authority concept as generating ‘chameleonic’ horizontal effect. As seen above during the analysis of the position of ordinary private persons, victims who cannot make use of s.3 HRA can only enforce their Convention rights against a private person by using the indirect horizontal effect mechanism. Also, if an ordinary private defendant finds itself on the receiving end of an attempt by a claimant to rely in this way on a qualified Convention right containing a ‘protection of the rights of others’ qualification, the defendant has the general ability to respond to the Convention claim – again, indirectly, via the court – by relying on its *own* Convention rights through that qualification. Whose Convention rights eventually prevail is determined by the judicial balancing exercise between them, but the fact that an ordinary private person has the opportunity to deploy its rights in this way, it is recalled, is the significant point to keep in mind.

If, however, the private defendant were a hybrid public authority performing public functions and facing the direct accusation that it had violated a claimant’s Convention right, whether or not it could avail itself of the same opportunity would be heavily governed by how the court characterised the dispute at hand. The hybrid public authority provisions provide a victim with a statutory rights-based cause of action against an ostensibly public defendant and, to this end, therefore appear to allow that victim to rely *vertically* upon the Convention against a hybrid public authority in exactly the same way as against a core public authority such as a government department or local authority. But focussing on the provisions as *vertical*, however, generates problems for a hybrid public authority because it may find itself unable to rely on the Convention qualifications at all. At first instance in *Leonard Cheshire*, in which Stanley Burnton J. held in the context of an art.8 ECHR claim that a charity was not performing “functions of a public nature” under s.6(3)(b) by providing residential care and accommodation on behalf of a local authority, his Lordship observed that “the justifications referred to in Article 8.2 [ECHR] are all matters relevant to government, and not of any non-public body” such as a care home provider.<sup>124</sup> Article 8(2) reads as follows:

“There shall be no interference by a public authority [with the right to privacy]... except such as... is necessary... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

It is indeed difficult to see how a care home provider could successfully claim that it was acting in the “economic well-being of the country” or “in the interests of national

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<sup>124</sup> *R. (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [71]. See also D. Oliver, “Functions of a public nature under the Human Rights Act” [2004] P.L. 329, pp.343-344.

security” when evicting a resident, for instance.<sup>125</sup> As Sir Richard Buxton recently put it after retiring from the Court of Appeal:

“Art 8(2) was plainly drafted with only public authorities in mind: bodies that, unlike private citizens, are responsible for, and have the authority to do something about, national security, public safety [and so on].”<sup>126</sup>

Most significantly, it would strain the language of art.8(2) to say that the care home was acting for the protection of the rights and freedoms of *others* when seeking to rely on its *own* Convention right, say, to respect for property under art.1 of the First Protocol. In essence, if the hybrid public authority provisions are straightforwardly regarded as establishing a *vertical* framework for rights protection against a private body fulfilling the hybrid public authority criteria under ss 6(3)(b) and 6(5), the danger exists that hybrid public authorities, largely unable to rely directly on the Convention qualifications, would be denied free recourse to them. Since these qualifications may include the protection of the rights of “others”, a qualification from which ordinary private defendants can derive indirect Convention protection against private claimants via the court,<sup>127</sup> hybrid public authorities would appear to be in a weaker position when exercising public functions than they would have been when acting in their private capacities. As a result, they would be rights-stripped.

Two potential solutions to this problem have already been proffered elsewhere. First, as Stanley Burnton J. appeared to suggest in *Leonard Cheshire*, one might contain the problem by lending only a minimal reading to the scope of s.6(3)(b).<sup>128</sup> This would require claimants to pursue the Convention claims against private defendants, which they would otherwise have pursued through s.6(3)(b), through other means such as s.3 HRA or the common law indirect horizontal effect mechanism explained above. However, unless s.6(3)(b)’s scope were to be interpreted to vanishing point, which would flout Parliament’s clear intention to apply that provision to *some* private individuals, the problem of rights-stripping the remaining hybrid public authorities who were caught by that provision would remain. Moreover, neither the common law indirect horizontal effect mechanism nor s.3 HRA provide for rights-based causes of action to allow claimants to argue their Convention claims in court, indicating the alternative means of pursuing such claims to be inadequate substitutes for an action under s.6(3)(b) anyway.

A second solution, which Sir Richard Buxton explores, is simply to fudge the text of art.8(2) or any other qualified Convention provisions referring to the rights of “others” to mean the rights of others *including the hybrid public authority itself*.<sup>129</sup>

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<sup>125</sup> This is not to say that hybrid public authorities will *never* be able to rely directly on the Convention qualifications, however. A private prison operator, for instance, might be able to claim when routinely intercepting a prisoner’s correspondence that it was acting “for the prevention of disorder or crime” or “in the interests of national security” under art.8(2) ECHR: see C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (OUP, Oxford, 2007), p.261.

<sup>126</sup> R. Buxton, “Private life and the English judges” (2009) O.J.L.S. 413, p.416.

<sup>127</sup> Lord Mance also indicated in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 A.C. 95, at [116], that a hybrid public authority might be able to invoke an “ordinary private law freedom to carry on operations under agreed contractual terms” here.

<sup>128</sup> *R. (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [73].

<sup>129</sup> R. Buxton, “Private life and the English judges” (2009) O.J.L.S. 413, pp.416-417.



Despite its alluring simplicity, this solution maintains a textual fiction which it would be preferable to avoid rather than embrace.

A third solution, which this article argues is the most appropriate of the three because it would allow hybrid public authorities to use their rights horizontally as a shield *and* avoid the textual artificiality seen above, is to read the hybrid public authority provisions as generating ‘chameleonic’ horizontal effect. Under the chameleonic model, as its title may suggest, the framework of rights protection is regarded as switching, from ostensibly vertical to a position more closely resembling indirectly horizontal, at the point where the dispute in question reaches court. Essentially, ss 6(1), 6(3)(b) and 6(5) establish a temporary fiction – that an institutionally private person is a public authority – in order to provide the cause of action necessary to bring that person to court. To ensure that hybrid public authorities are not defensively rights-stripped as compared to ordinary private individuals however, the private claimant, *when in court*, should no longer be seen as asserting their rights directly against the hybrid public authority itself but instead, as in litigation against an ordinary private defendant, *indirectly* against the hybrid public authority via the court.<sup>130</sup> Because the claimant is seeking during the course of the dispute to assert their rights against the court rather than the hybrid public authority itself, it would then be open for the defendant hybrid public authority, if the claimant relied on a qualified right, to respond to that claim by advancing its own Convention right through the “protection of the rights and freedoms of others” or similar qualification contained in the right relied on by the claimant.<sup>131</sup> Whose rights prevailed, it is recalled, would be determined by the judicial balancing exercise undertaken between the rights in question. Crucially however, the chameleonic model would eliminate the risk of rights-stripping that the defendant would otherwise face if the hybrid public authority provisions were regarded as creating a purely vertical framework of rights protection. Whilst the framework can *in formal terms* be seen as either vertical, in the sense that ss 6(1), 6(3)(b) and 6(5) together generate a cause of action against an ostensibly public authority, or – though perhaps less obviously – directly horizontal, in the sense that the public authority is in reality a private individual, *in substance* the framework more closely resembles one of indirect horizontal effect than anything else: although the hybrid public authority provisions obviate the need for a claimant to pursue their Convention claim through an existing common law cause of action, that claimant, when in court, should properly be regarded as asserting the Convention against the defendant not directly but via the court instead.

## Conclusion

The widely-held assumption that the HRA somehow denies hybrid public authorities Convention protection when performing public functions, this article has attempted to demonstrate, is a myth. Maintaining the ability of hybrid public authorities to rely on the Convention when performing public functions, for the most part, will be a straightforward task requiring simply that courts recognise the performance of public functions by a hybrid public authority as incapable of bearing on its ability to make

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<sup>130</sup> As Stanley Burnton J. observed in passing at first instance in *R. (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [73], although a private care home operator *itself* would be unable to plead the Convention qualifications, the *courts* can consider the care home’s position under the “rights of others” because the courts themselves are public authorities.

<sup>131</sup> See also *R. (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [73] (Stanley Burnton J.).

Convention claims. The task becomes more complex, however, in situations where a hybrid public authority might wish to rely on the Convention defensively against a private claimant seeking to use the Convention against it. In these situations, safeguarding the Convention rights of hybrid public authorities is best achieved by reading the hybrid public authority provisions as generating chameleonic horizontal effect. The chameleonic model rests upon a simple proposition: although s.6(3)(b) HRA designates certain private persons as public authorities in order to allow private claimants to bring them to court based on allegations that they have acted unlawfully by breaching Convention rights, their status as rights-holders remains unaffected by the existence of the Convention-based cause of action against them such that *they should be treated like any other private individuals during the dispute itself*.

Aside from proffering its findings for the purpose of aiding courts who may need to consider in detail the potential for hybrid public authorities to rely on the Convention in future, this article also injects the perennial debate over the proper scope of the term “functions of a public nature” under s.6(3)(b) with a much-needed fresh perspective. There is an obvious link between the width of that provision and the severity of the consequences for the individuals who are brought within it as hybrid public authorities. Debunking the rights-stripping idea as a significant source of harm to hybrid public authorities does not of itself compel the conclusion that s.6(3)(b) should be read to apply to the delivery of contracted out public services by private contractors. But especially given the weaknesses in the attempts in *YL* to explain why it should not, this article’s findings do represent an additional reason not to read s.6(3)(b) so narrowly.